

Little Hoover Commission  
925 L Street, Suite 805  
Sacramento, CA 95814

Re: Summary of Proposed Testimony August 24, 2006  
The Role of the Judge in The Sentencing Process:

To the Honorable members of the Commission:

Thank you for the opportunity to address you concerning the role of the Judge in the sentencing process. My comments will address the questions asked by you of me in your letter of June 21.

California has an excellent and well-trained judiciary dedicated to implementing the purposes of criminal sentencing under law. These purposes are specified in Penal Code section 1170:

*"1170 (a) (1) The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion."*

In 2004, subsection (b) was added. It recognized the need to prepare "nonviolent inmates" for reentry into society by the implementation of educational and other programs.

To achieve these objectives, the electorate through its legislature, define the crimes and set the punishment. This is done by enacting laws that set a range of possible sentences for an offense, leaving it to the judge to impose a specific sentence on a specific offender. No law can address the unique character of a specific offense and address the nature of the offender, the severity of the offense, the consequences of the crime upon the victim and the safety of the community. The best that can, and should, be hoped for is to create a palate of colors from

which the judge may choose the paint appropriate to the canvas before him or her. The palates vary from crime to crime; the painting is different from case to case.

When first enacted, the determinate sentencing law imposed few limitations on the judge imposing sentence. She or he decided whether to grant or deny probation. If probation was denied, the jurist then selected one of three possible terms of imprisonment as provided by the statute defining the crime and its punishment.<sup>1</sup>

Examples: Robbery – 2, 3 or 5 years in prison.

Rape – 3, 6 or 8 years in prison.

In deciding which of the three terms to select the judge is guided by the California Rules of Court which identify the factors to be considered in deciding to grant or deny probation and which of the three terms ought to be selected should probation be denied. Among the factors to be considered were the nature and severity of the crime, the effect upon the victim, the defendant's criminal history and a variety of other factors that logically and reasonably should be considered in deciding the fate of one convicted of a crime.

The limitations upon sentencing discretion included use of a gun in the commission of violent crimes (P.C. § 1203.06), certain violent sex offenses and sex offenses against minors (P.C. §§ 1203.065, 1203.066) and the infliction of great bodily injury (§ 1203.075). Eligibility was also limited or prohibited should the offender have a criminal history.

In 1994 came 3-Strikes. If, because of criminal history, the offender qualified for sentencing under the 3-Strikes law, the judge could not grant probation. No matter what the current offense, whether violent or not, if the offender had one prior serious or violent prior felony conviction (P.C. §§ 1192.7(c), 667.5(c)) the judge had to double the sentence imposed for the offense. If the offender had two or more serious or violent prior felony convictions the judge had to sentence the offender to a minimum of 25 years to life. Although the judge has the power to "strike" a prior offense or offenses, it is limited. (*People v Superior Court (Romero)* (1996) 13 Cal.4th 497.)

3-Strikes not only converted a determinate term of imprisonment into an indeterminate term, it substantially reduced the "credits" to which a prisoner was entitled from 50% to 20%. Thus, a person who received a doubled term because

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<sup>1</sup> I have not discussed the many variables involved in the sentencing process. Thus, there is no discussion of sentencing enhancements (was a gun used, how much was taken, infliction of injury) or of consecutive sentencing for multiple offenses and there is little addressed to criminal history other than the discussion of the 3-strikes law.. I simply defer to the wisdom of Justice Gardner who, in assessing the complexity of the determinate sentencing law, opined: "As a sentencing judge wends his way through the labyrinthine procedures of section 1170 of the Penal Code, he must wonder, as he utters some of its more esoteric incantations, if, perchance, the Legislature had not exhumed some long departed Byzantine scholar to create its seemingly endless and convoluted complexities. Indeed, in some ways it resembles the best offerings of those who author bureaucratic memoranda, income tax forms, insurance policies or instructions for the assembly of packaged toys." (*Community Release Bd. v. Superior Court* (1979) 91 Cal.App.3d 814, 815.)

of a single prior strike conviction, would serve a minimum of 30% more time in custody on an already doubled sentence. More significantly, the person with two or more prior strikes would have to serve 80% of the minimum indeterminate term before he or she was eligible for consideration for parole.

At about the same time came further limitations on sentencing and "1-strike offenses." (P.C. §§ 667.61 and 667.7.) P.C. § 2933.1 reduced the custody credits of an inmate convicted of a violent felony to 15% and, if the inmate was serving a 3-strike sentence, the credits were reduced from 20% to 15%. In addition, persons convicted of certain violent sex crimes committed in certain specified ways or with a specified criminal history were subject to sentences of 15 years to life or 25 years to life.

The judge has little discretion in 3-strikes cases and no discretion in violent sex cases to do anything other than impose the sentence as mandated by law without regard to the specifics of the offense or the offender. The effect is not only to deny the court its traditional role of dealing with each case as unique but also to dramatically increase the length of defendant's imprisonment. It is the duty of the sentencing judge to follow the legislative mandate and impose the sentences as required by law.

The result is an ever increasing prison population and a system powerless to modify sentences for those who, because of age, infirmity, circumstance or rehabilitation, no longer present a threat to society and who have paid for their offense. The cost of this inflexibility in the system is profound. Thus, we must ask if there is a better way to punish certain offenses, to review others and to rehabilitate more effectively.

There should be some provision for judges to treat the exceptional case. There must be some provision for the system to evaluate those whom it has imprisoned to determine if that person needs to remain in prison custody. In addition, there should be provision to deal more appropriately with those who are addicted to drugs. Perhaps a post-sentence review process after the inmate has served a certain minimum time coupled with appropriate performance evaluations? The review might be judicial or administrative. Either way it must be transparent so that the public whom we serve is never left to feel that decisions are being made without the opportunity for it to know what is transpiring.

In so commenting, I recognize the strong and proper public sentiment concerning crimes of violence, including the use of firearms and other weapons, and sex offenses. They are clearly treated with greater scrutiny and punished more severely than other classes of crimes. My focus, rather, is upon offenses that do not present the dangers inherent in crimes of violence but for which lengthy sentences are meted out and for which other or additional types of sanctions can be considered.

Conclusion: The sentencing decision is perhaps the most difficult one that a jurist is called upon to make. At the moment of sentencing, the safety of society,

the well-being of the victim, and the future of the convict must be decided. What role, if any, does prison population, cost of incarceration, and prison safety play in the decision? I suggest that it is none! Judges sentence one person at a time and the length and circumstance of that sentence ought not to depend on how many prisoners have gone before and the current population walking the prison yard. The judge must have the flexibility to impose a sentence appropriate to the crime. I suggest that, under present circumstances, commitment to prison will likely make the convict worse, not better. If we can avoid a prison sentence and meet other sentencing objectives we ought to do so.

At the same time there must be a way for the system to deal with the inmate who no longer requires incarceration and who is serving time for other than a violent offense which, I am given to understand, constitutes most of those in prison custody. Whether it is a review commission that reports to the legislature to enable it to modify the sentencing laws, or a post commitment commission or board that reviews prisoner performance, the system must have the ability to release on a meaningful parole those who are ill-served by continued confinement.

Judges live in the community that they serve. Like you, we do not wish to see dangerous people on the streets committing crime. But, no one is suggesting that the dangerous and violent offenders are the ones about whom we have been speaking. Rather, it is the non-violent, often substance abusing offender at whom we should look more closely. By front-loading the commitment process and back-loading the review process we may well be able to reduce the dangers of prison over-crowding and its attendant cost, while at the same time reducing recidivism and increasing public safety.

Thank you.

Respectfully submitted,

Hon. Steven Z. Perren  
Associate Justice